Supreme Court, U.S.
FILED
07-244 JUN 15 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

QIAN GAO,

Petitioner,

v.

ALBERTO GONZALES, Attorney General

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Second Circuit Court of Appeals deny the petitioner his fundamental rights to due process under the Fifth Amendment by employing the fugitive disentitlement doctrine to summarily dismiss the petitioner's appeal of an agency finding in contravention of its own precedent and without considering the substantive underlying arguments, and thereby violate the petitioner's Eighth Amendment rights by exposing him to cruel and unusual punishment?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities iv

Citation to Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Petition 5

A. The fugitive disentitlement doctrine is employable primarily in the context of criminal law, and its groundless employ in the context of immigration law by the Court of Appeals for the Second Circuit, while discretionary, was inappropriate and arbitrary 5

1. The fugitive disentitlement doctrine was borne out of and developed as a tool to aid in the swift adjudication of criminal matters 5

2. The court of Appeals for the Second Circuit arbitrarily applied the fugitive disentitlement doctrine 8

Contents

Page

B. This Honorable Court should grant certiorari as the Court of Appeals for the Second Circuit has arbitrarily and capriciously denied Mr. Gao's appeal under the fugitive disentitlement doctrine in contravention of its own applicable precedent 12

C. The Court of Appeals for the Second Circuit has proof that persons in Mr. Gao's circumstances face torture and persecution if returned to China, and the Court's failure to address the merits of his claims in light thereof constituted violations of both the Fifth and Eighth Amendments to the Constitution 13

D. The Federal Circuit Courts of Appeals are not in agreement with the use or the fugitive disentitlement doctrine as applicable in the context of immigration proceedings, thus presenting a federal question reviewable by this Honorable Court 15

Conclusion 16

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Decided March 20, 2007 ..... 1a

Appendix B — Decision And Order Of The United States Department Of Justice, Executive Office For Immigration Review Dated September 12, 2005 .. 11a

TABLE OF CITED AUTHORITIES

Page

SUPREME COURT CASES

Bridges v. Wixon,
326 U.S. 135 14

Cupp v. Naughten,
414 U.S. 141 (1973) 8, 9

Degen v. United States,
517 U.S. 820 (1996) 6, 7, 9, 10

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 14

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 14

Molinaro v. New Jersey,
396 U.S. 365 (1970) 6

Ng Fung Ho v. White,
259 U.S. 276 (1922) 14

Ortega-Rodriguez v. United States,
507 U.S. 234 (1993) 10

Reno v. Flores,
507 U.S. 292 (1993) 14

Smith v. United States,
94 U.S. 97 (1876) 6

Cited Authorities

Page

Thomas v. Arn,
474 U.S. 140 (1985) 8, 11

U.S. v. Payner,
447 U.S. 727 (1980) 9

Wong Yang Sung v. McGrath,
339 U.S. 33 (1950) 14

FEDERAL CASES

Antonio-Martinez v. INS,
317 F.3d 1089 (9th Cir. 2003) 9, 15

Arana v. U.S. INS,
673 F.2d 75 (3d Cir. 1982) 15

Bar-Levy v. U.S. Dep 't. of Justice, INS,
990 F.2d 33 (2d Cir. 2003) 9, 10

Blanco v. INS,
68 F.3d 642 (2d Cir. 1995) 13

Gao v. Gonzales,
481 F.3d 173 (2d Cir. 2007) 1, 9, 10, 15

Garcia-Flores v. Gonzales,
477 F.3d 439 (6th Cir. 2007) 15

Hassan v. Gonzales,
484 F.3d 513 (8th Cir. 2007) 15

Cited Authorities

Page

Romero-Morales v. INS,
25 F.3d 125 (2d Cir. 1994) 13

Sapoundjiev v. Ashcroft,
376 F.3d 727 (7th Cir. 2004) 15

Shou Yung Gao r. Gonzales,
463 F.3d 109 (2d Cir. 2006) 12

Zhang v. Gonzales,
481 F.3d 867 (2d Cir. 2006) 4, 12, 13

AGENCY DECISIONS

In re Qian Gao,
(A73-573-380, BIA September 12, 2005) 1

STATUTES

8 U.S.C. § 1158(a) 2

8 U.S.C. § 1251(b) 2

28 U.S.C. § 1254 1

INA § 208(a) 2

INA § 241(b) 2

Cited Authorities

Page

SECONDARY REFERENCES

U.S. House of Representatives, Committee on International Relations, Subcommittee on International Operations and Human Rights, *Statement of Gao Xiao Duan, Planned-Birth Officer*, 104th CON. (June 10, 1998) 4

U.S. House of Representatives, Committee on International Relations, *Coercive Population Control in China: New Evidence of Forced Abortion and Forced Sterilization*, 107th CON. (October 17, 2001) 3-4

Wishnie, Michael J., *Immigrants and the Right to Petition*, 78 N.Y.U. L. Rev. 667 (2003) 5

Petitioner Qian Gao asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, *Gao v. Gonzales*, 481 F.3d 173 (2d Cir. 2007), is attached to this petition as Appendix A. The agency opinion issued by the Board of Immigration Appeals, *In re Qian Gao*, No. A73-573-380 (BIA September 12, 2005), is attached hereto as Appendix B.

STATEMENT OF JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment on March 20, 2007. The Court of Appeals denied Mr. Gao's timely petition for review of the decision of the Board of Immigration Appeals on March 20, 2007. The order denying review of the agency appeal is attached hereto as *Appendix A*. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. § 1254, as the decisions below served to deprive Mr. Gao of his rights as granted under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No person . . . shall be deprived of life, liberty, or property, without due process of law."

The decision of the Court below also invokes the Eighth Amendment to the Constitution of the United States, which states, in whole, that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Court of Appeals' improper application of the fugitive disentitlement doctrine as a dispositive tool with which it wholly and summarily dispelled any consideration of the merits of Mr. Gao's argument on appeal, which decision is in contravention of its own precedent. The Court of Appeals' decision is therefore arbitrary, capricious, and a clear violation of Mr. Gao's Fifth Amendment rights. The decision below also exposes Mr. Gao to the certainty of cruel and unusual punishment in violation of the Eighth Amendment. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decision below.

Mr. Gao was placed in removal proceedings before the Honorable Patricia A. Rohan, who denied his application for asylum and withholding of removal under sections 208(a) and 241(b) of the Immigration and Nationality Act, codified at 8 U.S.C. §§ 1158(a) and 1251(b), respectively. He appealed Judge Rohan's denial of relief to the Board of Immigration Appeals, which dismissed his appeal on December 30, 1996. The Immigration and Nationality Service alleges that it issued a notice for Mr. Gao to surrender himself for deportation (colloquially termed a "bag-and-baggage letter"), which Mr. Gao never received. After remaining in the U.S. as a tax-paying, law-abiding member of the community, Mr. Gao

married, subsequently fathering two American-born children. Mr. Gao later moved the Board of Immigration Appeals to reopen his removal proceedings on the basis of newly-discovered, previously unavailable evidence. The Board of Immigration Appeals denied Mr. Gao's motion on September 12, 2005, on primarily procedural grounds, without offering a comprehensive analysis of the merits of his argument. *See Appendix B*. Mr. Gao appealed the Board of Immigration Appeals decision to the Court of Appeals for the Second Circuit, which followed in kind, denying Mr. Gao's appeal on wholly procedural grounds, declining to reach the merits of his case. *See Appendix A*. Petitioner thus submits this timely petition for this Honorable Court's entry of a writ for review of the decision below.

Mr. Gao arrived in the United States from the Fujian Province of China. While in the United States as a tax-paying member of the community, Mr. Gao courted and married, and thereafter fathered two U.S.-born children. Aware of the bestial means and unyielding manner in which the Chinese government enforces its coercive population control policy Mr. Gao, for the sake of himself and his family, petitioned the Board of Immigration Appeals to reopen his removal proceedings on the basis of his subjectively held and objectively reasonable fear of persecution and the likelihood of his torture were he to return to the Fujian Province as a violator of China's coercive population control policy. Under China's coercive policy, persons who have borne children without the express permission of the Chinese government are regularly made subject to involuntary sterilizations and abortions (which occur as late as the third trimester), exorbitant fines, imprisonment and torture therein. *See* U.S. House of Representatives, Committee on International Relations, *Coercive Population Control in China: New*

Evidence of Forced Abortion and Forced Sterilization, 107th CON. (October 17, 2001); *see also* U.S. House of Representatives, Committee on International Relations, Subcommittee on International Operations and Human Rights, *Statement of Gao Xiao Duan, Planned-Birth Officer*, 104th CON. (June 10, 1998).

The Court of Appeals for the Second Circuit arbitrarily applied the fugitive disentitlement doctrine to Mr. Gao's matter, after previously remanding like matters with similar underlying factual bases to the Board of Immigration Appeals for review of the merits of the substantive claim. *See Zhang v. Gonzales*, 481 F.3d 867 (2d Cir. 2006). In *Zhang*, decided only a few months prior to the Court's decision below, the Court of Appeals for the Second Circuit granted the petition for review of an order of the Board of Immigration Appeals. *Id.* The petitioner in that matter submitted a motion to reopen his removal proceedings after not challenging an *in absentia* order of removal entered almost eight years prior. The Court, on its own discretion, remanded the matter to the BIA for a decision on the merits of the petitioner's substantive claims in light of newly-obtained documents which "provide for the first time evidence of *an official policy of forced sterilization* in Changle City, Fujian Province, from which [the petitioning alien] comes." *Id.* (Emphasis added). As stated above, and undisputed in the record, Mr. Gao hails from the Fujian province of China, and like the alien in the *Zhang* matter, fathered two U.S.-born children, in violation of China's coercive population control policy. The Court of Appeals for the Second Circuit, however, seemingly failed to remember the newly-documented evidence which it referenced in the *Zhang* decision, which it claims may finally concretely *prove* the existence of a *policy* of involuntary sterilization in place in the province from which Mr. Gao hails. A decision by the lower tribunal in the *Zhang* matter remains pending.

Mr. Gao hereby asserts that the Court of Appeals for the Second Circuit, in contravention of its own precedent, violated his Fifth Amendment rights to due process of law by summarily dismissing his matter under the arbitrary implementation of the fugitive disentitlement doctrine. Also, in light of the Court's own admission of the possibly authentic evidence proving the existence of a mandatory policy of involuntary sterilization under the coercive population control policies in place in China, and their dismissal or Mr. Gao's claim (effectively making the order of removal to China the last and controlling order), the Court of Appeals violated the protections of the Eighth Amendment by knowingly ordering Mr. Gao removed to a country in which it is more than likely that he will suffer cruel and unusual punishment under a mandatory policy.

REASONS FOR GRANTING THE PETITION

A. The fugitive disentitlement doctrine is employable primarily in the context of criminal law, and its groundless employ in the context of immigration law by the Court of Appeals for the Second Circuit, while discretionary, was inappropriate and arbitrary.

1. The fugitive disentitlement doctrine was borne out of and developed as a tool to aid in the swift adjudication of criminal matters.

The fugitive disentitlement doctrine is a long-wielded tool of the judiciary that was forged by this Honorable Court for the purpose of ensuring the enforceability of judgments in appeals brought by convicted felons. *See* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. Rev. 667, 744 (2003). In seminal precedent, this Court noted

its clear discretion to employ the doctrine to dispose of a *criminal* case, stating its right to dismiss appeals brought from criminal convictions "unless the *convicted* party . . . is where [he] can be made to respond to any judgment we may render." *See Smith v. United States*, 94 U.S. 97 (1876) (Emphasis added). Indeed, even in this Court's explanation of its several rationales behind the enforcement of the doctrine, almost a century later, it clothed it's reasoning in the language of the criminal law. *See Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) ("No persuasive reason exists why this Court should proceed to adjudicate the merits of a *criminal case* after the *convicted* defendant . . . escapes from the restrains placed upon him pursuant to the *conviction*.") (Emphasis added). Thus it is clear, even from this Honorable Court's own precedent, that the doctrine was intended as a tool with which to disentitle persons who have either pled to or been found guilty of a *criminal* violation of the various federal or state criminal codes, and who have fled from the exacting of justice during the pendency of an appeal of the underlying "guilty" verdict.

As this Court has laid the foundation and the framework within which the fugitive disentitlement doctrine can be applied, it has also meticulously discussed the inappropriate discretionary application of the doctrine in certain circumstances, and plainly prohibited its use in others. *See Degen v. United States*, 517 U.S. 820 (1996). In *Degen*, this Court found that the extension of the doctrine for application in a civil matter inextricably tied to the underlying criminal matter was unjustified. *Id.* Specifically, this Court found disentitlement to be an unjustified measure when a court's jurisdiction is "secure", and there is "no risk of delay or frustration in determining the merits" of the claim. *Id.* at 835. What must also be noted is this Court's

requirement in discouraging the use of the catch-all doctrine that the judgment entered be practically enforceable so as to not waste judicial resources on unenforceable judgments. *Id.* The civil matter in which the government in *Degen* sought to attach the doctrine was the forfeiture of properties allegedly procured with monies earned from the alien petitioner's international narcotics trafficking, the prosecution of which he escaped by fleeing to Switzerland, a country which would not extradite him to the U.S. to face criminal prosecution. *Id.* Still, this Honorable Court found that the lower court had the judicial resources and legal tools with which to manage the underlying claims without resorting to the sweeping solution of the fugitive disentitlement doctrine. *Id.* at 826.

The Petitioner argues that if this Court found the doctrine inapplicable in *Degen*, then its application by the Second Circuit Court of Appeals in his matter was all the more erroneous. Primarily, Mr. Gao has been neither charged, tried, nor adjudicated as a criminal, and therefore the doctrine does not apply in the instant matter. Though this Court has granted discretion to the federal district and circuit courts to warily employ the use of the fugitive disentitlement doctrine, it has not granted *carte blanche* for the doctrine's use in every context in which a person seeking a remedy from the Courts is considered "absent" during the adjudication of their petition. *See Id.* at 823. As such, no grounds exist upon which the use of the doctrine should be allowed in the context of civil immigration law. Though a finding of removability can be made during the proceedings of an undocumented alien seeking relief from U.S. Courts, removal proceedings are absent a "guilt" phase which would indisputably determine any actual *criminal* violation. Therefore, the use of the fugitive disentitlement doctrine in the context of the

immigration law by the Second Circuit Court of Appeals for the sole purpose of the arbitrary dismissal of an alien's appeal after the entry of an order of removal is groundless, and constitutes an abuse of discretion reviewable by this Honorable Court.

2. The Court of Appeals for the Second Circuit arbitrarily applied the fugitive disentitlement doctrine.

The Petitioner respectfully contends that the Court of Appeals for the Second Circuit arbitrarily and erroneously applied the fugitive disentitlement doctrine in the instant matter. The Court has employed its supervisory powers to create its own definition of the term "fugitive" outside of that generally accepted. It has extended the term beyond its intended criminal context for the sole self-serving purpose of providing a vehicle for its arbitrary application of the fugitive disentitlement doctrine, amounting to a reversible abuse of discretion. Also – as will be argued *post* – the Court of Appeals for the Second Circuit has entered precedent in which it has remanded to the Board of Immigration Appeals for further proceedings, matters in which the factual basis mirrors that of the Petitioner, making the use of the doctrine in this instance arbitrary and capricious.

This Honorable Court has found that the federal circuit courts of appeals have the supervisory powers to propagate procedural rules with which to manage litigation brought before them. *See Thomas v. Arn*, 474 U.S. 140, 146 (1985). This Honorable Court has even found such exercise of power by the courts of appeals "desirable", when it results in "sound judicial practice." *Id.* (citing *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)). Even still, this Court stated that when such

exercise of power gives rise to rules or procedures that are unconstitutional or in contravention of well-settled statutes, even if such rules or procedures represent a "sensible and efficient" use of that supervisory power, then the rule or provision must be reviewed by this Court. *Id.* at 148. This Court's review of procedures or rules is borne from the attempt to avoid conferring on the judiciary "discretionary power to disregard the considered limitations of the law it is charged with enforcing." *U.S. v. Payner*, 447 U.S. 727 (1980).

The Court of Appeals for the Second Circuit has broadened its use of the term "fugitive" to such an extent in employing the fugitive disentitlement doctrine that its use deprives aliens in removal proceedings of the opportunity to fully exercise due process guarantees afforded them. In truth, the Court of Appeals for the Second Circuit has acknowledged that the term "fugitive" (as it is universally understood) implies that at some point previous to the attachment of the moniker, the person referenced had to have at least been properly accused of committing a crime, and fled from the reach of the Courts at some point during or after the guilt phase of the ensuing criminal proceedings. *See Bar-Levy v. U.S. Dep't. of Justice, INS*, 990 F.2d 33, 35 (2d Cir. 2003). In fact, the Court acknowledged that "the 'paradigmatic object of the [fugitive disentitlement] doctrine is the convicted criminal who flees while his appeal is pending.'" *Degen*, 517 U.S. at 823 (citing *Antonio-Martinez v. INS*, 317 F.3d 1089, 1092 (9th Cir. 2003)). The same august tribunal has also noted, in its decision below, its right to employ the fugitive disentitlement doctrine at its discretion when presented with an appeal by a fugitive. *See Gao v. Gonzales*, 481 F.3d 173, 175 (2d Cir. 2007) (citations omitted). It is undisputed, this Honorable Court has unambiguously granted to the circuit courts the right to

employ the fugitive disentitlement doctrine at their individual discretion, but only in *criminal* matters in which the accused or convicted criminal seeks relief from the Courts, and has absconded from justice during the pendency of their petition. *See specifically Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993); *see also Degen*, 517 U.S. at 823.

Nevertheless, the Court of Appeals for the Second Circuit chose to extend the definition of "fugitive" beyond its actual meaning, and for application outside of its appropriate and intended context, including in its newly-developed umbrella definition aliens in immigration proceedings. *See Bar-Levy*, 990 F.2d at 35. Moreover, the Court of Appeals for the Second Circuit further expounded upon its adulteration of the definition of "fugitive" by stating that even aliens whose home address *and* place of employment are known to the government will be considered fugitives for the purposes of the employment of the fugitive disentitlement doctrine. *Gao*, 481 F.3d at 186. This definition of "fugitive" is not only overbroad and a clear abuse of judicial discretion, but it is quite literally antithetical to the term "fugitive" as it is generally understood. The definition posited by the Court below completely discards the "flight" element by stating that even if it is known where an alien in immigration proceedings continues to both live *and* work, if *any* "governmental resources" have to be used in bringing them physically within the custody of the Immigration and Naturalization Service, they will be considered a "fugitive," despite the fact that they have committed no crime, and have not absconded from justice or even *attempted* to flee.

What bears noting also is the fact that the definition of "fugitive" set forth by the Court of Appeals for the Second Circuit has no time element. To be fair, this occurrence is

most likely accredited to the fact that under the Second Circuit's definition of a fugitive, one need not be found guilty to be *considered* guilty, and one does not actually have to flee to be labeled as having fled from the jurisdiction of the Courts. As a result, imposing a temporal element as to the time of the actual flight from justice becomes an increasingly difficult hurdle to overcome. Indeed, under the Second Circuit's definition, aliens who have overstayed removal orders and are yet to appeal, or whose attorneys are in the preparatory stages of appealing when "found," as well as aliens who may have never received the "bag-and-baggage' orders through some error not their own (as in the instant matter), are all swept under the same umbrella definition with persons who knowingly and purposefully commit and are convicted of felonies, and who later appeal those convictions and flee not only the jurisdiction in which the crimes occurred, but the country in its entirety.

Plainly, the definition created and employed by the Court of Appeals for the Second Circuit is overbroad, engineered specifically to allow the Court to employ a doctrine whose creation and intent was never within the context of immigration. The Court has exercised its supervisory powers to create a rule that is neither "sensible" nor "efficient", and which does not result in "sound judicial practice." *See Thomas v. Arn*, 474 U.S. 140, 146 (1985). Thus, the use of the fugitive disentitlement doctrine by the Court below, which was only possible as a result of the contrivance of an overbroad definition, represents an unchecked abuse of discretion which calls for this Honorable Court's review.

B. This Honorable Court should grant certiorari as the Court of Appeals for the Second Circuit has arbitrarily and capriciously denied Mr. Gao's appeal under the fugitive disentitlement doctrine in contravention of its own applicable precedent.

In the event that this Honorable Court does not find that the Court of Appeals for the Second Circuit abused its discretion in both its expanse of the definition of a "fugitive," and its resultant broadened application of the fugitive disentitlement doctrine, this Honorable Court should review the decision below for arbitrariness and capriciousness, as the decision below was entered in contravention of the Court's own precedent. Specifically, Petitioner recalls this Honorable Court's attention to *Zhang v. Gonzlaes*, 481 F.3d 867 (2d Cir. 2006), mentioned *supra*. That matter, decided only a few months preceding the Court of Appeals for the Second Circuit's decision in the instant matter, presented the Court of Appeals for the Second Circuit with – for the first time possibly authentic documented proof that there is actually in place in the Fujian province a policy of mandatory sterilization for Chinese nationals who have given birth to foreign-born children without permission of the Chinese government. *Id.*; *see also Shou Yung Gao v. Gonzales*, 463 F.3d 109 (2d Cir. 2006). On the basis of this *possibility*, the Court of Appeals remanded the record to the Board of Immigration Appeals for validation of the documentation and further proceedings in accordance with its order. *Id.*

Petitioner argued in his brief in support of appeal to the Court of Appeals for the Second Circuit that the Board of Immigration Appeals failed to consider the record as a whole when reviewing his appeal. He argued that country reports within the record were consistent with his claims, and showed

a likelihood of his persecution and/or torture under China's coercive population control policy were he made to return to China. He cited to precedent entered by the Court of Appeals for the Second Circuit which stated that when there is evidence in the record that was not considered by the Board of Immigration Appeals in its decision, then the matter must be remanded to the Board for further proceedings. *See Blanco v. INS*, 68 F.3d 642 (2d Cir. 1995); *see also Romero-Morales v. INS*, 25 F.3d 125 (2d Cir. 1994). On appeal, the Court of Appeals for the Second Circuit employed the fugitive disentitlement doctrine to dismiss the appeal without reaching the merits, in spite of its knowledge of the documentation submitted in *Zhang* which – as yet to have been proven as inaccurate – ensures that the Petitioner would be subjected to the very torture and persecution from which he was seeking relief. Thus, the Court of Appeals for the Second Circuit chose to arbitrarily apply an improperly extended doctrine to dismiss the Mr. Gao's claims for relief without reaching the merits of the claim, ushering him into the hands of those from whom he sought protection. Therefore this Honorable Court should grant certiorari in this matter.

C. The Court of Appeals for the Second Circuit has proof that persons in Mr. Gao's circumstances face torture and persecution if returned to China, and the Court's failure to address the merits of his claim in light thereof constituted violations of both the Fifth and Eight Amendments to the Constitution.

The Fifth Amendment to the Constitution grants, in pertinent part, due process of law before a person can be deprived of life, liberty or property. *See* U.S. Const., Fifth Amend. The Eighth Amendment to the Constitution provides that no cruel and/or unusual punishment will be inflicted.

See U.S. Const., Eighth Amend. It is well established that this Honorable Court has extended Fifth Amendment guarantees of the due process of law to aliens in removal proceedings. *See Reno v. Flores*, 507 U.S. 292, 307 (1993); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). At stake in removal proceedings is the potential deprivation of a significant, constitutionally protected liberty interest, and often – more poignantly – the very life and freedom of the petitioning aliens. Accordingly, removal proceedings must be conducted in a manner which upholds the principles of fundamental fairness and substantial justice. *See Bridges v. Wixon*, 326 U.S. 135 (1945); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Ng Fung Ho v. White*, 259 U.S. 276 (1922). By arbitrarily and capriciously employing the improperly expanded and inappropriately applied fugitive disentitlement doctrine to dismiss his appeal without reaching the merits of the underlying claims, the Court of Appeals for the Second Circuit denied Mr. Gao his fundamental rights to due process of law.

Equally, the Court of Appeals for the Second Circuit ordered Mr. Gao removed to China despite recently obtaining information on the mandatory policy of sterilization in the Fujian province of China, from where Mr. Gao hails. The Court of Appeals for the Second Circuit deemed the documentation credible enough to effect a remand to the Board of Immigration Appeals in one matter, and insignificant enough for the Court to not even have to reach the merits of the claim before dismissing the appeal in Mr. Gao's matter. In essence, the order of the Court of Appeals dismissing Mr. Gao's appeal assured his exposure to cruel and unusual punishment at the hands of the Chinese government, punishment from which the Court of Appeals had the authority and power to deliver Mr. Gao.

Based on the Court of Appeals' denial and violation of Mr. Gao's Fifth and Eighth Amendment rights, this Honorable Court should grant certiorari in this matter.

D. The Federal Circuit Courts of Appeals are not in agreement with the use of the fugitive disentitlement doctrine as applicable in the context of immigration proceedings, thus presenting a federal question reviewable by this Honorable Court.

The Federal Circuit Courts of Appeals are not united in their application of the fugitive disentitlement doctrine in immigration proceedings, presenting a federal question for review by this Honorable Court. A majority of the Circuit Courts of Appeals are unified in their finding the fugitive disentitlement doctrine appropriate for application in immigration proceedings. *See Antonio-Martinez*, 317 F.3d 1089 (9th Cir. 2003); *Arana v. U.S. INS*, 673 F.2d 75 (3d Cir. 1982); *Garcia-Flores v. Gonzales*, 477 F.3d 439 (6th Cir. 2007); *Sapoundjiev v. Ashcroft*, 376 F.3d 727 (7th Cir. 2004); *Gao v. Gonzalez*, 481 F.3d 173 (2d Cir. 2007). However, the Court of Appeals for the Eighth Circuit has refused to apply the fugitive disentitlement doctrine in an instance in which an alien was ordered removed, left the country, and continued to petition the courts for relief. *See Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007). Thus, by granting certiorari in this matter, this Honorable Court can settle the question of the applicability of the fugitive disentitlement doctrine in the immigration context by the federal Circuit Courts of Appeal.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant certiorari and schedule this matter for briefing and oral argument to ensure Mr. Gao the opportunity to have the merits of his meritorious appeal reviewed by the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MARCH 20, 2007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 05-5013-ag

QIAN GAO,

Petitioner,

v.

ALBERTO GONZALES, Attorney General,

Respondent.

Argued September 12, 2006
Decided March 20, 2007

OPINION

CARDAMONE, *Circuit Judge*.

This is an appeal from the denial by the Board of Immigration Appeals of petitioner's motion to reopen his proceedings. The petitioner is now a fugitive, and because of that status is subject to having his appeal dismissed under the fugitive disentitlement doctrine. In a number of contexts, it is established that litigants who flee the reach of the courts risk losing the right of access to them. A criminal defendant who fails to appear at trial risks being tried *in absentia*; a litigant who fails to timely respond to a civil suit risks default

judgment; on similar reasoning, an alien who fails to comply with a notice to surrender for deportation risks losing the right to appeal that deportation.

Qian Gao (Gao or petitioner) petitions for review of a September 12, 2005 order of the Board of Immigration Appeals (BIA or Board) denying, as untimely, his motion to reopen his removal proceedings. On May 14, 1996, Immigration Judge Patricia A. Rohan (IJ) denied Gao's application for asylum and withholding of removal based on her finding that he lacked credibility and had failed to provide sufficient corroboration for his claims of persecution. The BIA summarily dismissed the appeal for failure to file a brief on December 30, 1996. Although Gao was granted 30 days from the date of the BIA's order to depart the country voluntarily, he failed to do so, and subsequently he ignored a lawful order issued on December 12, 1997 to surrender for deportation.

For the past ten years, Gao has continued to live in the United States illegally and to this day has failed to comply with the order to surrender to immigration authorities. He now seeks to reopen his asylum application, alleging changed country circumstances and the existence of previously unavailable material evidence. The BIA denied the motion to reopen as untimely under 8 C.F.R. § 1003.2(c)(2), because petitioner had not established changed country circumstances, which would render timeliness immaterial under 8 C.F.R. § 1003.2(c)(3)(ii). Gao now petitions this Court for review of the BIA's order and decision. Using our equitable discretion under the fugitive disentitlement doctrine, we dismiss the petition.

Appendix A

BACKGROUND

The facts in this case are straightforward and largely uncontested. Gao is a 36-year-old male from Fujian province in the People's Republic of China (China). Twelve years ago on November 9, 1994 he entered the United States illegally near Miami, Florida. Shortly after entering the country, Gao filed an application for asylum and withholding of removal in which he claimed he had been repeatedly persecuted in China because of his Buddhist religious beliefs.

Petitioner's application for asylum and withholding of removal was denied by the IJ in her May 14, 1996 oral decision. The IJ found Gao had failed to provide a consistent account of the events leading up to his departure from China and had not provided any corrobative evidence of his claims of persecution. After the BIA dismissed Gao's appeal on December 30, 1996, petitioner was granted 30 days from the date of the BIA order to depart the country voluntarily or else be deported. The BIA's decision was not appealed.

Subsequent to these proceedings, Gao did not depart the country voluntarily. Immigration officials sent him a notice to surrender for deportation (often called a bag-and-baggage letter) dated December 12, 1997, and petitioner signed a domestic return receipt form acknowledging receipt of this notice on January 12, 1998. The notice directed Gao to report for custody and removal on January 22, 1998. Nonetheless, he never reported for custody. For the next seven years, Gao neglected to contact immigration authorities. We now learn that during this time he married and had two children. In other words, petitioner continued to carry on his life in

complete disregard of the outstanding bag-and-baggage letter and deportation order against him.

On July 1, 2005 petitioner filed with the BIA the motion that is the subject of his appeal. He asserts the birth of his two children in the United States puts him and his family at risk of persecution under China's family planning policy. Although motions to reopen ordinarily must be filed within 90 days of the entry of the final administrative decision, 8 C.F.R. § 1003.2(c)(2), Gao claims the 90-day time limit does not apply to him because he has produced evidence of changed country circumstances in China and therefore falls under the exception in 8 C.F.R. § 1003.2(c)(3)(ii). The BIA denied the motion to reopen, and Gao has appealed.

DISCUSSION

The Fugitive Disentitlement Doctrine

A. *General Principles*

The fugitive disentitlement doctrine is an equitable doctrine that provides courts with discretion to dismiss the appeal of a defendant or petitioner who is a fugitive from justice during the pendency of the appeal. First applied by the Supreme Court in the late nineteenth century, *Smith v. United States*, 94 U.S. 97, 24 L.Ed. 32 (1876), the doctrine is now well established. *See, e.g., Ortega-Rodriguez v. United States*, 507 U.S. 234, 239, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993) ("It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal.");

Estelle v. Dorrough, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975) (per curiam) (noting state disentitlement statute providing for automatic dismissal of appeals by defendants who escape during pendency of appeal and do not return within ten days); *Eisler v. United States*, 338 U.S. 189, 190, 69 S.Ct. 1453, 93 L.Ed. 1897 (1949) (per curiam) (removing case from docket because petitioner fled country); *see also Degen v. United States*, 517 U.S. 820, 823, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996) ("We have sustained, to be sure, the authority of an appellate court to dismiss an appeal or writ in a criminal matter when the party seeking relief becomes a fugitive.").

While the "paradigmatic object of the doctrine is the convicted criminal who flees while his appeal is pending," *Antonio-Martinez v. INS*, 317 F.3d 1089, 1092 (9th Cir.2003), we have also long held that the doctrine applies with full force to an alien who fails to comply with a notice to surrender for deportation, *see Bar-Levy v. U.S. Dep't of Justice, INS*, 990 F.2d 33, 35 (2d Cir.1993). Like the criminal defendant fleeing after his conviction, an alien who fails to comply with an outstanding notice to surrender is a fugitive from justice. *See id.* (holding that the alien became a fugitive upon failing to comply with a notice to surrender for deportation). We have previously observed that an alien may be a fugitive even if his home address and place of employment are known to authorities. *Ofosu v. McElroy*, 98 F.3d 694, 700 (2d Cir.1996). This is because "the INS must deploy resources to bring him in. And, of course, he may not be so easy to find once his litigation options are exhausted." *Id.* Thus, for an alien to become a fugitive, it is not necessary that anything happen other than a bag-and-baggage letter be

issued and the alien not comply with that letter. "Everyone understands that the [government] is overwhelmed with petitioners and procedures, and that it heavily relies on the word and voluntary compliance of numerous aliens within our borders. It is easy to game this system, but we should not treat disregard of [government] directives as a norm. . . ." *Id.* at 702-03. Applying the fugitive disentitlement doctrine to fugitive aliens accords with the approach taken by every circuit that has considered the issue. *See Sapoundjiev v. Ashcroft*, 376 F.3d 727, 728-29 (7th Cir.2004); *Antonio-Martinez*, 317 F.3d at 1092; *Arana v. INS*, 673 F.2d 75, 77 (3d Cir.1982) (per curiam).[1]

We have articulated several reasons why the inherent power of the court to manage its own affairs should be used to dismiss an appeal of a party who is a fugitive during the pendency of the appeal. *See Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 280 (2d Cir.1997). Those reasons include the difficulty of enforcing any judgment rendered against a fugitive; the need for a sanction to redress the fugitive's affront to the dignity of the judicial process; the desire to promote the efficient operation of the courts by deterring escape; and finally, the need to redress any prejudice to the government occasioned by the fugitive's absence. *See id.* When a litigant becomes a fugitive during the pendency of an appeal to escape the effect of judgment, we have observed that any one of these rationales provides a

1. The Sixth Circuit also has applied the fugitive disentitlement doctrine in the immigration context but not yet in a published decision. *See Qui Jin Chen v. Gonzales*, 187 Fed.Appx. 502, 504 (6th Cir.2006) (unpublished); *Kacaj v. Gonzales*, 163 Fed.Appx. 367, 368 (6th Cir.2006) (per curiam) (unpublished).

sufficient basis for us to dismiss the appeal. *United States v. Awadalla*, 357 F.3d 243, 247 (2d Cir.2004).

The Supreme Court in *Degen* ruled that two of these rationales-imposing a penalty for flight and deterring future flight-do not support dismissal of a civil litigant's appeal due to his fugitive status in a separate criminal matter. *Degen*, 517 U.S. at 828-29, 116 S.Ct. 1777. The Court noted that the sanction of disentitlement is "most severe" and, if applied too freely, "could disserve the dignitary purposes for which it is invoked." *Id.* at 828, 116 S.Ct. 1777. Applying the fugitive disentitlement doctrine too liberally-for example, to bar a criminal fugitive from defending his property in a civil forfeiture action-is inappropriate because it is "an arbitrary response to the conduct it is supposed to redress or discourage," and in that way erodes the respect due the court's judgments, upon which the dignity of a court depends. *Id.* *Degen* therefore suggests that, when considering whether to disentitle a criminal fugitive from appearing in a separate civil appeal, the most persuasive justifications to do so are (1) to promote the enforceability of decisions rendered by the appellate court and (2) to avoid prejudice to the other party resulting from the litigant's fugitive status. *SEC v. Berger*, 322 F.3d 187, 192 (2d Cir.2003).

While the punitive and deterrent purposes of disentitlement are discounted when a criminal fugitive seeks to appeal in a separate civil matter, they remain important considerations when a litigant becomes a fugitive to escape judgment in the very matter on appeal. *See Awadalla*, 357 F.3d at 246 (post-*Degen* decision considering each of the rationales underlying the fugitive disentitlement doctrine in

dismissing the appeal of a criminal defendant who fled during the pendency of his appeal). Litigants who abscond in the midst of an ongoing appeal defy the authority of the very court from which they seek relief. *Id.* Disentitlement is an appropriate sanction for such litigants because their flight is "calculated to disrupt the very appellate process which they themselves have set in motion." *See Estelle*, 420 U.S. at 541-42, 95 S.Ct. 1173; *see also Ortega-Rodriguez*, 507 U.S. at 246, 113 S.Ct. 1199 ("We have no reason here to question the proposition that an appellate court may employ dismissal as a sanction when a defendant's flight operates as an affront to the dignity of the court's proceedings.").

Rather than being "an arbitrary response to the conduct it is supposed to redress or discourage," *Degen*, 517 U.S. at 828, 116 S.Ct. 1777, disentitling a fugitive from appealing a judgment that he has fled sends a clear message to similarly situated litigants-flee the effect of a judgment and the privilege of challenging that judgment vanishes with you. *See Ortega-Rodriguez*, 507 U.S. at 247, 113 S.Ct. 1199 (noting that "[o]nce jurisdiction has vested in the appellate court . . . dismissal may be an appropriate sanction by which to deter"). When an appellant or petitioner is a fugitive from the very judgment that is the subject of the appeal, we therefore consider all the rationales that underlie the fugitive disentitlement doctrine.

B. *Doctrine's Application to This Case*

Gao's continued failure to surrender to immigration officials renders him a fugitive from justice. It is therefore within our discretion under the fugitive disentitlement doctrine to dismiss his appeal.

Appendix A

Applying the fugitive disentitlement doctrine to dismiss Gao's appeal furthers each of the rationales underlying the doctrine. First, Gao's fugitive status means that there is no assurance that any decision or order we render against him will be enforced. The gravamen of his petition is the posture of "heads I win, tails you'll never find me." *Antonio-Martinez*, 317 F.3d at 1093. Second, Gao's failure to report for custody throughout the duration of this appeal undercuts the authority and dignity of the judicial process. Disentitlement is an appropriate sanction where, as here, the petitioner disdains the authority of the court in the very matter in which he seeks relief. *Awadalla*, 357 F.3d at 246. Third, dismissing Gao's appeal will promote the efficient operation of the courts by preserving judicial resources and deterring similarly situated petitioners from fleeing justice.

Fourth, and finally, there is no doubt that allowing Gao to proceed with this appeal despite his fugitive status will unduly prejudice the government. Petitioner asserts that his marriage and the birth of his two children in the United States constitute changed circumstances sufficient to warrant reopening his motion for asylum and withholding of removal. While we do not reach the merits of this argument, we note that it rests largely on events of his own making that transpired while he was a fugitive. Allowing his motion to reopen to go forward would have the perverse effect of encouraging aliens to evade lawful deportation orders in the hope that, while they remain fugitives, they may contrive through their own efforts a new basis for challenging deportation. *See Wei Guang Wang v. BIA*, 437 F.3d 270, 274 (2d Cir.2006) ("[I]t would be ironic, indeed, if petitioners . . . who have remained in the United States illegally

following an order of deportation, were permitted to have a second and third bite at the apple simply because they managed to marry and have children while evading authorities.").

The fugitive disentitlement doctrine is discretionary. *See Esposito v. INS*, 987 F.2d 108, 110 (2d Cir.1993). However, there are no circumstances here militating against applying the doctrine of dismissal. Gao fails to offer any explanation whatsoever for his fugitive status. Thus, having been presented with no reason to overlook petitioner's fugitive status and reach the merits of his petition, we decline to do so. Instead, we dismiss petitioner's appeal. By dismissing his appeal asking us to review the Board's denial of his motion to reopen removal proceedings, we discourage petitioners from fleeing to evade the finality of a lawful deportation order and the removal to come.

CONCLUSION

For the reasons stated above, Gao's petition for review is dismissed.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED SEPTEMBER 12, 2005

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: SEP 12 2005

File: A73 573 380 - New York

In re: QIAN GAO

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Alexander Kharash, Esquire

ON BEHALF OF DHS:
Leslie S. Evans
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before us on December 30, 1996, when we dismissed the respondent's appeal from an Immigration Judge's order finding the respondent deportable as charged, and denying his application for asylum and withholding of deportation. The respondent now moves that

we reopen proceedings for consideration of evidence of changed personal circumstances and of changed circumstances in his native China. He also seeks to apply for relief under the Convention Against Torture (CAT) on the basis of circumstances that have arisen subsequent to the hearing. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) opposes the motion. The respondent's motion will be denied.

The respondent's motion to reopen has been filed out of time. The final order in these proceedings was entered by the Board on December 30, 1996. Pursuant to 8 C.F.R. § 1003.2(0(2), a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. In the instant case, the Board did not receive the respondent's motion until July 5, 2005, which is clearly more than 90 days after the December 30, 1996, order. The motion is thus untimely. In so far the respondent seeks reopening to pursue relief under the CAT, the motion has likewise been filed out of time. Specifically, the respondent's order of deportation became final before March 22, 1999. Thus, the deadline for filing a motion to reopen seeking relief under the CAT was June 21, 1999. *See* 8 C.F.R. § 1208.18(b)(2). Moreover, in so far the respondent's motion to reopen involves a claim for asylum based on opposition to China's coercive population control policies, having filed such motion more than 90 days after July 9, 2002, the respondent's motion is also untimely. *See Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002).

Appendix B

The respondent indicated that he was married in August 2000, and that he now has two United States born children (born in March 2001 and May 2005). As such, the respondent claims that he now has a well-founded fear of persecution in his native China on account of his opposition to that country's coercive population control policies. The respondent submitted various evidence including articles on the subject of China's coercive population control policies. The respondent claims that his untimely motion to reopen should be considered under 8 C.F.R. § 1003.2(c)(3)(ii). However, coercive population control policies have been in place in China for a number of years. Overall, the evidence submitted together with the respondent's motion to reopen does not reflect a recent material change in the conditions in his native China. Moreover, a change in the respondent's personal circumstances in the United States does not serve as an adequate basis for granting his untimely motion to reopen. *See Guan v. BIA*, 345 F.3d 47 (2nd Cir. 2003). In view of the foregoing, the following order shall be entered.

ORDER: The respondent's motion to reopen is denied.

s/ Frederick D. Hess
FOR THE BOARD

13

No. 07-244

In the Supreme Court of the United States

QIAN GAO, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly exercised discretion to dismiss petitioner's immigration appeal under the fugitive disentitlement doctrine.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 4
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Allen v. *Georgia*, 166 U.S. 138 (1897) 5, 8
Antonio-Martinez v. *INS*, 317 F.3d 1089 (9th Cir. 2003) 5, 6, 9
Arana v. *INS*, 673 F.2d 75 (3d Cir. 1982) 5
Bonahan v. *Nebraska*, 125 U.S. 692 (1887) 5
Degen v. *United States*, 517 U.S. 820 (1996) 4, 7, 8, 9
Eisler v. *United States*, 338 U.S. 189 (1949) 5
Estelle v. *Dorrough*, 420 U.S. 534 (1975) 4
Garcia-Flores v. *Gonzales*, 477 F.3d 439 (6th Cir. 2007) 5
Giri v. *Keisler*, No. 06-60569, 2007 WL 3276110 (5th Cir. Nov. 7, 2007) 5
Hassan v. *Gonzales*, 484 F.3d 513 (8th Cir. 2007) 6
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) 7
Molinaro v. *New Jersey*, 396 U.S. 365 (1970) 5
Ortega-Rodriguez v. *United States*, 507 U.S. 234 (1993) 5, 9
Sapoundjiev v. *Ashcroft*, 376 F.3d 727 (7th Cir.), reh'g denied, 384 F.3d 916 (7th Cir. 2004) 5, 6, 8, 9
Smith v. *United States*, 94 U.S. 97 (1876) 5

Cases—Continued: Page

Wittgenstein v. *INS*, 124 F.3d 1244 (10th Cir. 1997) 5
Zhang v. *Gonzales*, 204 Fed. Appx. 962 (2d Cir. 2006), reh'g granted, 481 F.3d 867 (2d Cir. 2007) 7

Constitution, statute and regulations:

U.S. Const.:
Amend. V (Due Process Clause) 7
Amend. VIII 7
Immigration and Nationality Act § 265(a), 8 U.S.C. 1305(a) 9
8 C.F.R.:
Section 265.1 9
Section 1003.2(c)(2) 3
Section 1208.18(b)(2)(i) 3

In the Supreme Court of the United States

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QIAN GAO, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 481 F.3d 173. The decision of the Board of Immigration Appeals (Pet. App. 11a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2007. A petition for rehearing was denied on May 10, 2007. The petition for a writ of certiorari was filed on June 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

BEST AVAILABLE COPY

STATEMENT

The immigration judge found petitioner ineligible for asylum and ordered him deported. The Board of Immigration Appeals (Board) dismissed his appeal because he failed to file a brief, and petitioner did not seek judicial review of that order. Petitioner failed to comply with an order to report for deportation, and remains a fugitive nearly a decade later. While a fugitive, petitioner moved the Board to reopen his deportation proceeding. The Board denied his motion, and the court of appeals dismissed his petition for review pursuant to the fugitive disentitlement doctrine.

1. Petitioner is a native and citizen of the People's Republic of China. Pet. App. 3a. On November 9, 1994, petitioner entered the United States illegally. *Ibid.* Shortly thereafter, petitioner filed an application for asylum and withholding of deportation, in which he asserted that he had been persecuted in China because of his Buddhist faith. *Ibid.* An immigration judge denied the application because petitioner had not presented credible evidence to substantiate his claims of persecution. *Ibid.* Petitioner appealed to the Board, but he failed to file a brief in support of his appeal. *Id.* at 2a. On December 30, 1996, the Board summarily dismissed his appeal. *Ibid.* Pursuant to petitioner's request, he was granted voluntary departure; he had until January 29, 1997, to leave the country voluntarily rather than be deported. See *id.* at 3a; C.A. App. 311-312. Petitioner did not seek judicial review of the Board's decision, nor did he depart the country as ordered. Pet. App. 3a.

By notice dated December 12, 1997, immigration officials directed petitioner to surrender for deportation on January 22, 1998. Pet. App. 3a; C.A. App. 9. Petitioner signed a receipt for the notice on January 12, 1998. Pet.

App. 3a; C.A. App. 10. Petitioner failed to report as ordered, and apparently has remained in the United States illegally ever since. Pet. App. 3a.

2. On July 1, 2005, more than seven years after he failed to surrender, petitioner filed with the Board a motion to reopen his case. Pet. App. 4a. Petitioner asserted that he had married and had two children, and that as a result he and his family would face persecution under China's population-control policies if he were deported. *Ibid.* The government opposed the motion to reopen, both because it was not timely filed, see 8 C.F.R. 1003.2(c)(2), 1208.18(b)(2)(i), and because petitioner's status as a fugitive precluded him from seeking further relief. C.A. App. 4-7. On September 12, 2005, the Board denied the motion to reopen as untimely. Pet. App. 12a-13a. Petitioner sought review in the court of appeals.

3. The court of appeals dismissed the petition for review based on the fugitive disentitlement doctrine. Pet. App. 1a-10a. The court first explained the "well established" principle that courts have discretion to dismiss appeals by fugitives from justice, a principle that "applies with full force to an alien who fails to comply with a notice to surrender for deportation." *Id.* at 4a, 5a. The doctrine permits dismissal of a fugitive's appeal for at least four different reasons, including "the difficulty of enforcing any judgment rendered against a fugitive"; "the need for a sanction to redress the fugitive's affront to the dignity of the judicial process"; "the desire to * * * deter[] escape"; and "the need to redress any prejudice to the government occasioned by the fugitive's absence." *Id.* at 6a. The court of appeals stated that each of those rationales applies fully to an immigration proceeding in which "a litigant becomes a fugitive to escape judgment in the very matter on appeal." *Id.* at 7a. Al-

though a fugitive may be permitted to continue litigating a *separate* civil action, see *ibid.* (citing *Degen* v. *United States*, 517 U.S. 820, 828-829 (1996)), the court concluded that disentitlement remains an appropriate sanction for fugitives whose flight is "calculated to disrupt the very appellate process which they themselves have set in motion," *id.* at 8a (quoting *Estelle* v. *Dorrough*, 420 U.S. 534, 541-542 (1975) (per curiam)). Thus, the court noted, "every circuit that has considered the issue" has applied the fugitive disentitlement doctrine to aliens who fail to comply with a deportation or removal order. *Id.* at 6a.

The court of appeals then held that petitioner's conduct amply justified dismissing his petition for review. Pet. App. 8a-10a. In particular, the court pointed out that petitioner's motion to reopen rested largely on "events of [petitioner's] own making that transpired while he was a fugitive," meaning that permitting petitioner to obtain relief on such a theory would encourage aliens in petitioner's position to evade removal for as long as possible while developing new grounds to remain in the country. *Id.* at 9a.

Finally, the court noted that although the fugitive disentitlement doctrine is discretionary, petitioner had "fail[ed] to offer any explanation whatsoever for his fugitive status," and thus had given the court no reason to stay its hand. Pet. App. 10a. Accordingly, the court exercised its discretion to dismiss the petition for review. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and consistent with the precedent of every other circuit that has considered the issue, as well as with this Court's

longstanding endorsement of the fugitive disentitlement doctrine. No further review is warranted.

1. For well over a century, this Court has endorsed the proposition that federal courts possess discretion to preclude a fugitive from justice from seeking judicial relief during his or her flight. See *Smith* v. *United States*, 94 U.S. 97, 97-98 (1876); accord *Molinaro* v. *New Jersey*, 396 U.S. 365, 365-366 (1970); *Eisler* v. *United States*, 338 U.S. 189, 190 (1949) (per curiam); *Bonahan* v. *Nebraska*, 125 U.S. 692, 692 (1887); see also *Allen* v. *Georgia*, 166 U.S. 138, 140-141 (1897) (holding that a similar rule applied in state court was consistent with due process). "Moreover, this rule is amply supported by a number of justifications," including ensuring the enforceability of federal judgments, deterring flight from detention, and promoting orderly appellate practice. *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 242 (1993).

The courts of appeals that have considered the question unanimously agree that these same justifications permit the dismissal of an alien's appeal challenging an order directing his removal from the United States when he evades the removal order and becomes a fugitive. See *Giri* v. *Keisler*, No. 06-60569, 2007 WL 3276110, at *2 (5th Cir. Nov. 7, 2007) ("[W]e join with every other circuit that has addressed whether the fugitive disentitlement doctrine applies to appeals from the [Board] under similar facts."); *Garcia-Flores* v. *Gonzales*, 477 F.3d 439, 441-442 (6th Cir. 2007); *Sapoundjiev* v. *Ashcroft*, 376 F.3d 727, 728-729 (7th Cir.), reh'g denied, 384 F.3d 916 (7th Cir. 2004); *Antonio-Martinez* v. *INS*, 317 F.3d 1089, 1092 (9th Cir. 2003); *Arana* v. *INS*, 673 F.2d 75, 77 (3d Cir. 1982); see also *Wittgenstein* v. *INS*, 124 F.3d 1244, 1245 (10th Cir. 1997) (holding that

"we have the right to dismiss the appeal because petitioner remained a fugitive during most of the time her appeal was pending," but reinstating the appeal because the petitioner was apprehended before decision). As several of these cases point out, the fugitive disentitlement doctrine is well suited to the immigration context: an alien who petitions for judicial review of his removal, but refuses to surrender so that the removal may take place, "has the same 'heads I win, tails you'll never find me' quality that justifies disentitlement in other contexts." *Antonio-Martinez*, 317 F.3d at 1093; accord *Sapoundjiev*, 376 F.3d at 729 (the proposition that "flight ma[kes] the litigation a one-way street," and justifies dismissal, "is as applicable to the fugitive alien as it is to the fugitive criminal defendant").

Petitioner acknowledges these "unified" holdings, but suggests that the Eighth Circuit has reached a different conclusion. Pet. 15. That contention is incorrect. In *Hassan* v. *Gonzales*, 484 F.3d 513 (8th Cir. 2007), the alien sought and was granted leave to depart voluntarily after the Board rejected her asylum claim. She timely departed the country and, from abroad, continued to challenge her removal and denial of asylum. While abroad, she failed to meet with immigration officials to discuss her request for a stay of removal. The court held that in light of the alien's compliance with the voluntary departure order, her absence from the meeting (and from the country) did not preclude her from continuing to seek judicial review. *Id.* at 516. That holding is entirely inapposite here: Hassan was not a fugitive, and the Eighth Circuit did not dispute that the disentitlement doctrine could apply to an alien who, unlike Hassan but like petitioner, "attempt[ed] to evade the reach of the law." *Ibid.* Indeed, whereas Hassan de-

parted voluntarily from the United States, petitioner flouted the voluntary departure order that he himself had sought.

The courts of appeals thus are in broad agreement that they have discretion to dismiss fugitive aliens' petitions for review. Petitioner has failed to establish any intercircuit conflict warranting this Court's review.[1]

2. The decision below is not in conflict with any decision of this Court. As the decision below explains, this Court's cases squarely support applying the fugitive disentitlement doctrine in the immigration context. Indeed, nearly all of the courts of appeals that have examined the question have done so since 1996, with the full benefit of this Court's most recent fugitive disentitlement decisions.

Petitioner asserts (Pet. 6-7, 9-10) that this Court's decision in *Degen* v. *United States*, 517 U.S. 820 (1996), precludes applying the fugitive disentitlement doctrine except in criminal cases.[2] That contention is incorrect.

---

[1] Petitioner also claims that the Second Circuit created an intracircuit conflict by not remanding his case, whereas it remanded another asylum challenge brought by a native of the same Chinese province. Pet. 12. No fugitive disentitlement issue was raised in the latter case, see *Zhang* v. *Gonzales*, 204 Fed. Appx. 962 (2d Cir. 2006), reh'g granted, 481 F.3d 867 (2d Cir. 2007), and the substance of petitioner's untimely motion to reopen is irrelevant in any event.

[2] Although *Degen* was expressly based on this Court's supervisory power rather than any constitutional provision, see 517 U.S. at 828, petitioner contends that both the Eighth Amendment and the Due Process Clause forbid application of the fugitive disentitlement doctrine in his case. But the Eighth Amendment has no application to deportation proceedings. Cf. *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration

In *Degen*, the Court considered whether a federal court could preclude a fugitive from defending a civil action. Degen was charged with drug offenses and fled to Switzerland, where he remained beyond the reach of the United States' criminal process. The government brought a civil action to forfeit various of Degen's real estate holdings as proceeds of drug sales. Degen, through counsel, filed an answer opposing the forfeiture. 517 U.S. at 822. The district court struck Degen's answer and entered judgment against him based on the fugitive disentitlement doctrine, and the court of appeals affirmed, *ibid.*, but this Court reversed. The Court held that precluding Degen from defending his property interest did not validly further any of the legitimate interests that it had previously identified as justifying the fugitive disentitlement doctrine: the district court's *in rem* jurisdiction over the property to be forfeited was secure, no matter where Degen was, *id.* at 825, and Degen's absence "entitle[d] him to no advantage," because the district court had various options (such as discovery sanctions) to ensure that Degen's fugitive status did not impair the litigation, *id.* at 826-827. The Court did not, as petitioner would have it, forever limit the fugitive disentitlement doctrine to criminal proceedings; rather, it held only that "[t]here was no necessity to justify" disqualifying fugitive Degen from defending the forfeiture action. *Id.* at 829.

Nothing in *Degen* detracts from the decision below. As Judge Easterbrook has explained, *Degen* focused the analysis on the "practical question" whether the litigant's "flight [has] made the litigation a one-way street."

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laws."). And disentitlement comports with due process in civil contexts just as it does in criminal cases. See, *e.g.*, *Allen*, 166 U.S. at 140-141.

Sapoundjiev, 376 F.3d at 729. Degen's absence from the United States did not have that effect on the *in rem* civil litigation. 517 U.S. at 825. By contrast, when an alien challenging his removal disregards the order putting that removal into effect, he refuses to accept the consequences of a loss in court. *Antonio-Martinez*, 317 F.3d at 1093. That is precisely the sort of "connection between a defendant's fugitive status and his appeal" that this Court has recognized as an appropriate basis for dismissal. *Ortega-Rodriguez*, 507 U.S. at 249; see Pet. App. 8a. Indeed, here petitioner's motion to reopen was based on events made possible by his failure to surrender as ordered by the immigration authorities: his marriage and the birth of his children. Pet. App. 9a.

3. Petitioner also asserts (Pet. 10-11) that the Second Circuit should not have applied the fugitive disentitlement doctrine to his case. He suggests that the Second Circuit's definition of the term "fugitive" is overbroad because it encompasses even those aliens whose home address and place of employment are known to the government. Petitioner never asserts that *he* falls into that category, or that he has complied with his legal obligation to keep the government informed of his whereabouts, see *Antonio-Martinez*, 317 F.3d at 1092 (citing Immigration and Nationality Act § 265(a), 8 U.S.C. 1305(a); 8 C.F.R. 265.1); his last known address is that to which the deportation notice was sent in 1997. But even if he remains at that address, the doctrine applies whenever an alien fails to report for removal as directed. "[I]t is far from clear that [removable aliens] will choose to be at home when agents arrive to arrest them * * * . The point of custody is to end the guessing game. That's why anyone who is told to surrender, and does not, is a fugitive." *Sapoundjiev*, 376 F.3d at 729.

Finally, petitioner asserts (Pet. 2, 11) that he never received the order to surrender for removal. Even if that fact-bound contention were suitable for this Court's review, it would still be contrary to the record evidence. The government explained to the court of appeals that petitioner had signed a certified-mail receipt for the order of removal. Gov't C.A. Br. 6; see C.A. App. 10. Petitioner did not file a reply brief in the court of appeals, and neither his petition for rehearing nor his petition for a writ of certiorari discusses his signature on the receipt. See Pet. for Reh'g 5; Pet. 2. In this Court, petitioner offers only the assertion of his counsel that he never received the notice. Pet. 2. Petitioner provides neither any statement as to his own whereabouts nor, as the court of appeals observed, "any explanation whatsoever for his [continued] fugitive status." Pet. App. 10a. The court of appeals did not abuse its discretion by applying the fugitive disentitlement doctrine in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2007

Supreme Court, U.S.
FILED
DEC 26 2007
OFFICE OF THE CLERK

(3)

No. 07-244

78

IN THE
SUPREME COURT OF THE UNITED STATES

QIAN GAO,
Petitioner,

v.

MICHAEL MUKASEY, Attorney General
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Cited Authorities ii

TABLE OF CONTENTS

I. THE FUGITIVE DISENTITLEMENT DOCTRINE APPLIES ONLY TO THOSE WHO FALL WITHIN THE SCOPE OF THE STATUS, "FUGITIVE," AS PETITIONER DOES NOT, THE DOCTRINE IS INAPPLICABLE, AND ITS USE, IN ERROR.....1

A. As Petitioner Did Not Flee Custody, The Use Of The Term Fugitive, And Concomitantly, The Fugitive Disentitlement Doctrine Is In Error.....1

B. Application Of The FDD In The Instant Case Would Violate Petitioner's Fifth Amendment Rights.....5

II. EVEN IF PETITIONER IS IN FACT DEEMED A FUGITIVE, APPLICATION OF THE FDD IS IMPROPER.....6

A. The Use Of The Fugitive Disentitlement Doctrine Is Unnecessary And It's Application Is Therefore Improper.....6

TABLE OF AUTHORITIES

Supreme Court Cases

Bridges v. Wixon, 326 U.S. 135 (1945) 5
Degen v. U.S., 517 U.S. 820 (1996) ..... 1, *passim.*
Harisiades v. Shaughnessy, 342 U.S. 580 (1952) 5
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 5
Ng Fung Ho v. White, 259 U.S. 276 (1922) 5
Reno v. Flores, 507 U.S. 292, 307 (1993) 5
Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 5

Federal Cases

Antonio-Martinez v. INS, 317 F.3d 1089 (9th Cir. 2003) 2
Bar-Levy v. United States Dep't of Justice, INS, 990 F.2d 33 (2d Cir. 1993) 1, 2
Bhasin v. Gonzales, 423 F.3d 977 (9th Cir. 2005) 6
Collazos v. United States, 368 F.3d 190 (2nd Cir. 2004) 3
Empire Blue Cross & Blue Shield v. Finkelstein, 111 F.3d 278 (2d Cir. 1997) 3
Gao v. Gonzales, 481 F.3d 173 (2d Cir. 2007) 1
Ofosu v. McElroy, 98 F.3d 694 (2d Cir. 1996) 2
United States v. Sharpe, 470 U.S. 675, (1985) 8
United States v. Van Cauwenberghe, 934 F.2d 1048 (9th Cir. 1991) 8
Xian Chai Huang v. United States DOJ, 231 Fed. Appx. 52 (2d Cir. 2007) 4
Zapon v. U.S. Department of Justice, 53 F.3d 283 (9th Cir. 1995) 2

Agency Decisons

Matter of Barocio, 19 I. & N. Dec. 255, 256 (BIA 1985) 6

REPLY BRIEF

I. THE FUGITIVE DISENTITLEMENT DOCTRINE APPLIES ONLY TO THOSE WHO FALL WITHIN THE SCOPE OF THE STATUS, "FUGITIVE," AS PETITIONER DOES NOT, THE DOCTRINE IS INAPPLICABLE, AND ITS USE, IN ERROR.

A. As Petitioner Did Not Flee Custody, The Use Of The Term Fugitive, And Concomitantly, The Fugitive Disentitlement Doctrine Is In Error.

As the Court of Appeals for the Second Circuit (hereinafter "Second Circuit") noted when the instant matter appeared before it; "[t]he fugitive disentitlement doctrine is an equitable doctrine that provides courts with discretion to dismiss the appeal of a defendant or petitioner who is a fugitive from justice during the pendency of the appeal." *Gao v. Gonzales*, 481 F.3d 173, 175 (2d Cir. 2007). In coming to the conclusion that the Federal Disentitlement Doctrine (hereinafter "FDD") was applicable to Mr. Gao, the Second Circuit extended the doctrine from its paradigmatic application, that of a fugitive fleeing while his appeal is pending, to that of an alien failing to comply with a notice to surrender for deportation (*Id.* at 175-176). In doing so, the Second Circuit relies on its precedential

decision of, *Bar-Levy v. United States Dep't of Justice, INS*, 990 F.2d 33, 35 (2d Cir. 1993).

This Honorable Court, however, explicitly refrained from making such an expansion to the term "fugitive" in *Degen v. U.S.*, deciding the case, but at the same time to declining to resolve "whether Degen is a fugitive in all the senses of the word debated by the parties." 517 U.S. 820, 828 (1996). Additionally, in earlier decisions, both the Second Circuit and the Ninth Circuit Courts of Appeals have found ambiguity with regard to the term fugitive as it would apply to an alien in Mr. Gao's circumstances.

The Ninth Circuit, in attempting to explain how someone who, like Mr. Gao did not flee custody, but rather remained in his home, his location known to the government, could be deemed a fugitive said; "[a]lthough an alien who fails to surrender to the INS despite a lawful order of deportation is not, *strictly speaking*, a fugitive in a criminal matter, we think he is nonetheless *a fugitive from justice*." *Antonio-Martinez v. INS*, 317 F.3d 1089, (9th Cir. 2003), citing *Zapon v. U.S. Department of Justice*, 53 F.3d 283, 285 (9th Cir. 1995); *Bar-Levy v. United States Dep't of Justice, INS*, 990 F.2d 33, 35 (2d Cir. 1993). (Emphasis added). Similarly, the Second Circuit also redefined the meaning of the term "fugitive" saying in *Ofosu v. McElroy*, "he is a fugitive *in the sense* that the INS must deploy resources to bring him in." *Ofosu v. McElroy*, 98 F.3d 694, 700 (2d Cir. 1996). (Emphasis added). That these Courts felt compelled to redefine the term

fugitive, parsing its meaning into disparate "senses," and categories, e.g., "fugitive from justice," in order to apply the FDD to a non-reporting alien, highlights the incongruence between the "paradigmatic" model and Mr. Gao's case.

While the Respondent properly asserts that *Degen* does not preclude the application of the FDD in civil matters, it fails to address this Honorable Court's prior eschewance with regard to defining the scope of the states encompassed by the term "fugitive." The consequence of this silence is an exercise in semantical gymnastics by the Ninth and Second Circuit Courts. The resulting definitions, "an alien who fails to surrender... is not, *strictly speaking*, a fugitive in the criminal matter," "fugitive, *in the sense...*" and "fugitive *from justice...*" are illustrative of the need for explication by this Honorable Court in this matter.

It is worthwhile to note that apparently even the Second Circuit Court disagrees with the Ninth Circuit Court's definition of "fugitive from justice."[1] To wit, in *Collazos v. United States*, the Second Circuit Court said, "[a] fugitive from justice has been defined as '[a] person who, having committed a crime, flees from [the] jurisdiction of [the] court where [a] crime was committed or departs from his usual place of abode and conceals himself within the

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[1] In the case at bar the Second Circuit calls Mr. Gao a "fugitive from justice." Neither the reason for the expansion nor an acknowledgment of it is provided. *Gao v. Gonzales*, 481 F.3d at 176 citing *Bar-Levy v. United States Dep't of Justice, INS*, 990 F.2d 33, 35 (2d Cir. 1993)

district.'" 368 F.3d 190, 195-196 (2d Cir. 2004) citing *Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 281 (2d Cir. 1997) (quoting Black's Law Dictionary 604 (5th ed. 1979)). Such a definition is in direct accord with the paradigmatic example of a "fugitive" (one who flees while an appeal is pending) and in direct opposition to Mr. Gao's circumstances (not flight taken), and the Ninth Circuit Court's definition of a "fugitive from justice."

Moreover, Petitioner asserts that not only did he not flee from justice; he was never even aware of being called into custody and challenges the veracity of the signature on the "bag and baggage" letter receipt. Admittedly, Petitioner did not raise the issue of the falsified signature before the Second Circuit. However, as the application of the FDD, and consequently, Mr. Gao's status as a "fugitive," only became an issue after the Second Circuit's decision, there was no need to raise the defense. Conversely, and contrary to the Respondent representation, once the Second Circuit foreclosed Mr. Gao's appeal he noted his challenge of the receipt, stating; "[t]he Immigration and Nationality Service alleges that it issued a notice for Mr. Gao to surrender himself for deportation, which Mr. Gao never received." (Pet. 2). Petitioner therefore respectfully asserts that he is not foreclosed from raising this defense and that he is neither a fugitive, nor a "fugitive from justice."

In fact, in a decision subsequent to the matter at bar the Second Circuit, in deciding whether application of the FDD was proper used the following reasoning; "Huang has neither denied

receiving notice of the order nor explained her failure to comply. Under these circumstances, we find it appropriate to invoke the fugitive disentitlement doctrine and dismiss Huang's petition for review." *Xian Chai Huang v. United States DOJ*, 231 Fed. Appx. 52, 54 (2d Cir. 2007). That Mr. Gao's denial of receiving notice and his subsequent explanations as to his failure to comply are not taken into consideration in his case, but yet, are the determining factors regarding application in a case decided by the same court, a decision that even cites to the case at bar, brings into sharp relief, the inconsistencies behind its current application.

B. Application Of The FDD In The Instant Case Would Violate Petitioner's Fifth Amendment Rights

It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings. See *Reno v. Flores*, 507 U.S. 292, 307 (1993); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). At stake in asylum proceedings is the potential deprivation of a significant, constitutionally protected liberty interest, and often – more poignantly – the very life and freedom of the Petitioner. Accordingly, removal proceedings must be conducted in a manner which upholds the principles of fundamental fairness and substantial justice. See *Bridges v. Wixon*, 326 U.S. 135 (1945); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987);

Harisiades v. Shaughnessy, 342 U.S. 580 (1952); *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

As such, application of the FDD in this case, where the subject is not, in fact, a fugitive, represents not only an abuse of the doctrine, but also an abridgment of Mr. Gao's Constitutional, Fifth Amendment rights. Respondent is quick to point out (Res. 8) that "disentitlement comports with due process in civil contexts just as it does in criminal cases." However, regardless of the purported accord between the two, it is clear that disentitlement is does not comport, in any context, when the subject of the sanction is himself, not a fugitive.

II. EVEN IF PETITIONER IS IN FACT DEEMED A FUGITIVE, APPLICATION OF THE FDD IS IMPROPER.

A. The Use Of The Fugitive Disentitlement Doctrine Is Unnecessary And It's Application Is Therefore Improper

As this Court noted in Degen, "[a] court's inherent power is limited by the *necessity* giving rise to its exercise." (829) (Emphasis added). Mr. Gao has never made any attempt to hide from the federal government. He has gotten married and filed a marriage certificate, he has had children and filed their birth certificates. He has made himself

available to the government. Consequently, the use of the FDD is excessive and therefore, not in line with the guidelines set forth in *Degen*. In *Degen*, the court found that the circumstances were such that "[t]here was no necessity to justify the rule of disentitlement." (Ibid.). Petitioner asserts that such is true in his case as well.

In *Bhasin v. Gonzales*,[2] the court denied application of the FDD pointing out that there were significant differences between the circumstances of the case and that of *Matter of Barocio*,[3] an agency decision relied on by the Board of Immigration Appeals. In *Baroccio*, the Court notes, in addition to a signed receipt the "agency also detailed its efforts to locate the respondents, including attempts to locate them at "their last known address, the male respondent's last known place of employment, the postal service, the California Department of Motor Vehicles, and the local gas and telephone companies.'" *Bhasin v. Gonzales*, 423 F.3d 977, 988-989 (9th Cir. 2005) citing *Matter of Barocio*, 19 I. & N. Dec. 255, 256 (BIA 1985). The Court then declines to apply the FDD in Mr. Bhasin's case, saying; "[w]e find no such deliberate flouting of the immigration laws in the present case." (Ibid.). Similarly, no such attempts were made to locate Mr. Gao either. In fact, if the agency had attempted to find Mr. Gao, they would have found him at home, at the address they had in their possession. The need

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[2] 423 F.3d 977 (9th Cir. 2005)

[3] 19 I. & N. Dec. 255 (BIA 1985).

for the application of the FDD is therefore, lacking as well.

To highlight this lack of necessity Petitioner again points to the rarity with which the doctrine is applied in cases with circumstances such as his own. The fact that Circuit Courts have felt comfortable adjudicating their cases without relying on the doctrine, not only underscores the practicality of the endeavor, but addresses the superfluous nature of the application of the FDD in the instant matter.

Furthermore, the Second Circuit's contention that application of the FDD is necessary because the "INS must deploy resources to bring him in[,]" is, in fact, not an argument as to the necessity of the doctrine but rather, as to the economy of resources in adjudicating similar claims. Petitioner does not challenge the assertion, that in certain circumstances the government may be able to conserve its resources by allowing for a more liberal use of judicial sanctions. Petitioner does, however, dispute the rectitude of this purported justification. This Court clearly stated that the Federal Disentitlement Doctrine is to be used only when its application is deemed necessary; when it is *necessary*, not when it is convenient, not when it is expedient and certainly not when it is cost-effective.

The Respondent may contend that, in addition to its utility in conserving government resources, the application of the FDD serves to protect the dignity of the court in matters such as these. This Court, however, already addressed such a defense, saying; "[i]t remains the case, however, that the sanction of

disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked." *Degen v. U.S.*, 517 U.S. at 828. This is even truer where, as here, the application of the FDD is unnecessary and seemingly arbitrary. The application of the Fugitive Disentitlement Doctrine would result in, exactly as this Court cautioned in *Degen*, respect for the court being "eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits." (Ibid.). Additionally, the resulting removal would leave United States citizen children without a father, a family without financial support, and new mouths dependant on government welfare. If the government pursues application of the doctrine to conserve resources, surely this expense should factor into their calculation.

It is important to remember, as the Ninth Circuit highlighted; [t]he disentitlement doctrine, however, is not one of jurisdictional dimensions, but rather one based on equitable considerations. *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1054 (9th Cir. 1991) See *United States v. Sharpe*, 470 U.S. 675, 681 n.2, (1985) (disentitlement doctrine is "based on . . . equitable principle[s]"). The equities here demand for a hearing on the merits of Mr. Gao's claim. Accordingly, Petitioner respectfully asserts that the Second Circuit failed to follow the guidelines set forth for proper application of the FDD and abused their discretion in applying the Fugitive Disentitlement Doctrine in this case.

CONCLUSION

This Court should grant Petitioner's writ of certiorari and schedule this matter for briefing and oral argument, in order to address the scope of the Fugitive Disentitlement Doctrine and to ensure Mr. Gao the opportunity to have the merits of his meritorious appeal reviewed.

Respectfully submitted,

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December 2007